

Supreme Court, U.S.

FILED

APR 4 1978

MICHAEL PODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77 - 1414

ANNEMARIE HOFFMAN BECKWITH,

Petitioner,

v.

ROBERT T. L. BECKWITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

THOMAS P. JACKSON
1828 L Street, N.W.
Washington, D.C. 20036
(202) 457-1600

Counsel for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

ANNEMARIE HOFFMAN BECKWITH,

Petitioner,

v.

ROBERT T. L. BECKWITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner Annemarie Hoffman Beckwith respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in this proceeding October 31, 1977.

OPINIONS BELOW

Two opinions of the District of Columbia Court of Appeals appear at 355 A.2d 537 (D.C.App. 1976) and 379 A.2d 955 (D.C. App. 1977). See App. A and B, pp. 1a, 27a.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on October 31, 1977. A timely petition for rehearing or hearing *en banc*, filed on November 14, 1977 was denied January 5, 1978 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

1. Whether an order of a District of Columbia court for blood grouping tests to establish paternity upon an infant non-resident who is not a party to a divorce action against his mother by her husband on grounds of adultery violates the infant's rights under the Due Process clause of the U.S. Constitution.

STATEMENT OF THE CASE

Robert T. L. Beckwith, allegedly a resident of the District of Columbia, commenced an action for divorce on the ground of adultery against his wife, Annemarie Hoffman Beckwith, a resident of the Federal Republic of Germany. Substituted service of process was made upon Mrs. Beckwith in West Berlin. Mr. Beckwith then sought, but was denied, leave to amend his complaint to add a prayer for a declaratory judgment of the illegitimacy of Mrs. Beckwith's infant son (born, however, more than 11 months following her marriage to Mr. Beckwith). Mrs. Beckwith answered the complaint denying the adultery alleged and counter-claimed for divorce in her own right. Other than the husband's unsuccessful attempt to have the court declare the child's illegitimacy, neither husband nor wife sought any relief affecting the child in the form of custody, child support or otherwise.¹

¹The child, now nine years old, has at all times been in the custody of his mother who has acted throughout on the child's behalf. No guardian *ad litem* has been appointed for him.

Mrs. Beckwith moved for suit money and counsel fees. The Superior Court *sua sponte* conditioned an award of *pendente lite* financial assistance to her upon her submission of her child to blood grouping tests. On interlocutory appeal to the District of Columbia Court of Appeals by Mrs. Beckwith the court held, *inter alia*, that the trial court had and could constitutionally exercise jurisdiction to order blood tests of an infant non-party non-resident unrepresented by a guardian *ad litem*, because "hard and fast rules of jurisdiction" must be overcome by "the exigencies of domestic life" or courts would be unable to order blood tests in "many adultery cases [in which the children] reside with one spouse in a jurisdiction different from that of the other. . . ." 355 A.2d at 540-542. The District of Columbia Court of Appeals did, however, hold that the ". . . interests which are affected in this case relate only to the determination of adultery . . ." and that the child would not be bound by the result of the proceeding in any subsequent case where his legitimacy is questioned. 355 A.2d at 542.²

On remand, Mrs. Beckwith still refused, for reasons relating to her son's safety and privacy, to submit the child for blood grouping tests. The Superior Court adjudicated her in contempt of court and struck her counter-claim. Mrs. Beckwith absented herself from trial for fear of punishment for contempt. As a result, evidence offered by Mr. Beckwith was uncontested, and upon that evidence the Superior Court found for plaintiff and granted a divorce on the ground of adultery. On appeal, the District of Columbia Court of Appeals affirmed. 379 A.2d 955 (D.C. App. 1977).

²Mrs. Beckwith's petition for rehearing or hearing *en banc* on Due Process grounds under *International Shoe Company v. Washington*, 326 U.S. 310 (1945) was denied on June 1, 1976.

Mrs. Beckwith petitioned for rehearing or hearing *en banc* on the grounds that the order for blood grouping tests upon the child violated the child's own right to substantive due process, and that, in protecting her son's interests by disobeying what she believed to be an unlawful order, Mrs. Beckwith was forced to sacrifice her own right to procedural due process. The petition was denied without opinion on January 5, 1978.

REASONS FOR GRANTING THE WRIT

I.

THE ORDER FOR BLOOD GROUPING TEST EXCEEDED THE SCOPE OF CONSTITUTIONALLY PERMISSIBLE POWER OF THE DISTRICT OF COLUMBIA TRIAL COURT

The nine year old son of petitioner has never had any nexus whatsoever with the District of Columbia. He was neither born there nor has he resided there. He obviously has not done business, owned property, or caused tortious injury in the District of Columbia within the contemplation of the decisions of this Court in *International Shoe Company v. Washington*, 326 U.S. 310 (1945) and its progeny which hold that the *sine qua non* of the constitutional jurisdiction of a territorial tribunal in the United States is "certain minimum contacts" with the forum state. The child himself simply had no "contacts" with the District of Columbia at all. And yet a District of Columbia court has, thus far, succeeded in exercising power over him to the extent of requiring him to submit to blood tests which, if not onerous, nevertheless represent an intrusion upon his person and privacy which could never have occurred had he been an adult. Compare *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891) and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

To petitioner's knowledge, no case in this Court has ever decided whether a court may constitutionally order blood tests to be made on a non-resident minor not otherwise amenable to the jurisdiction of the court, over the express objection of the custodial parent, solely to obtain evidence which may be relevant to another matter over which the court does have jurisdiction.

II.

THE DIVORCE GRANTED RESPONDENT RESULTED FROM PETITIONER'S DISOBEDIENCE OF AN UNCONSTITUTIONAL ORDER OF THE DISTRICT OF COLUMBIA TRIAL COURT, AND, THUS, DEPRIVED PETITIONER OF DUE PROCESS OF LAW

If the District of Columbia was without constitutional power to order petitioner's infant son to submit to blood tests, Mrs. Beckwith, as his custodial parent, was obligated to resist the order. And in doing so she should not suffer adverse consequences to her own interests. See *In re Sawyer*, 124 U.S. 200 (1888); *Ex parte Fisk*, 113 U.S. 713 (1885); *Ex parte Rowland*, 104 U.S. 604 (1882). Notwithstanding, she was adjudicated in contempt of court, and her fear of punishment for her disobedience, enabled her husband to obtain a divorce virtually by default. The fact that the contempt adjudication was later vacated as "moot" does not detract from the fact that she was deprived of the due process to which she was entitled to protect her own marital rights. Thus, in protecting her son's constitutional rights as she did, Mrs. Beckwith lost her own.

Because the District of Columbia Court of Appeals failed altogether to consider and determine the scope of the several Due Process rights asserted, and because it is likely that extraterritorial effect may continue to be given in divorce cases in every state to orders for blood

tests on offspring whose legitimacy is in question, the Court should grant the writ.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Court of Appeals.

Respectfully submitted,

THOMAS P. JACKSON
1828 L Street, N.W.
Washington, D.C. 20036
(202) 457-1600

Counsel for Petitioner.

April 3, 1978

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 9426

ANNEMARIE HOFFMAN BECKWITH, APPELLANT,

v.

ROBERT T.L. BECKWITH, APPELLEE.

Appeal from the Superior Court of the
District of Columbia

(Argued November 13, 1975 Decided April 1, 1976)

Thomas Penfield Jackson, with whom *Patricia D. Gurne*
was on the brief, for appellant.*Elizabeth R. Young* for appellee.Before KELLY and KERN, Associate Judges, and
TAYLOR, Associate Judge, Superior Court.*

Opinion for the court by Associate Judge TAYLOR.

Concurring opinion by Associate Judge KELLY at p.
23.TAYLOR, Associate Judge: In an action for absolute
divorce on the grounds of adultery the husband-appellee

* Sitting by designation pursuant to D.C. Code 1973, § 11-707(a).

alleged that a child was born to his wife as a result of the commission of the act charged in the complaint. He was denied permission to add the child as a party defendant. The wife, in her answer, admitted that she executed a document purporting to state that the appellee was not the father of the child, but alleged that the document was obtained by fraud and duress and thus of no force and effect. She filed a counterclaim against the appellee for, *inter alia*, an absolute divorce on the grounds of adultery or desertion and moved for suit money and counsel fees.

On March 10, 1975, the lower court granted appellant's motion. However, the court at the same time, *sua sponte*, ordered (1) that appellant submit herself and her child to blood grouping tests and (2) that payment of the suit money and counsel fees be conditioned upon the filing of the test results with the court.¹ In its March 19, 1975 order on reconsideration the court reaffirmed its March 10 order in all respects and ruled that the legitimacy of the child was in issue in this proceeding pursuant to D.C. Code 1973, § 16-909. No guardian ad litem was specifically requested of, or appointed by, the court. This appeal is from both aspects of the *sua sponte* order of the court.²

The issues raised by the answers to the complaint and counterclaim have not come on for trial even though the complaint was filed over two years ago. The delay is, in part, the result of the wife's efforts to assure that the outcome of this proceeding will not affect adversely her

¹ The appellee was also required to submit to blood grouping tests and to cause the results to be filed with the court.

² Neither the appellant nor the appellee challenges the award of suit money (travel expenses from Germany) and counsel fees.

child's right, through her husband, to inherit under the Mary Harlan Lincoln Testamentary Trust, a trust established by the wife of Todd Lincoln, Abraham Lincoln's son. The lengthy pleadings and judicial actions thereon are set out in the Appendix of this opinion.

Appellant's challenges to the order requiring her to submit her child to blood grouping tests, and to do so prior to the payment of suit money and counsel fees, will be considered in our resolution of the following five issues: (I) Does the court have jurisdiction in an action for absolute divorce on the grounds of adultery to order a mother, who is before the court, to submit her child to blood grouping tests for the sole purpose of deciding the issue of adultery where the child is not a party, not a resident, not represented by a guardian ad litem, and where there is no request before the court for support, maintenance, or custody? (II) Does the court in an action for absolute divorce on the grounds of adultery have discretionary authority under a statute or rule to order a mother who is before the court to submit her child to blood grouping tests for the sole purpose of deciding the issue of adultery and, if so, was such discretion exercised without abuse in this case? (III) Does the ordering of blood grouping tests of a child in a divorce proceeding to prove adultery violate the child's constitutional right to privacy?³ (IV) Does the absence of a guardian ad litem in this case deny the child due process of law? (V) Does the conditioning of an award of suit money and counsel fees on submission of a mother and her child to blood grouping tests violate the mother's right to counsel and due process?

³ Appellant does not challenge the constitutionality of the blood test order with respect to her submission on these grounds. Appellant's lone constitutional objection with respect to her own rights is noted in question V.

We answer questions I and II in the affirmative, and questions III and IV in the negative. For the reasons set forth herein, we do not reach question V.

I.

The initial question is one of first impression in this jurisdiction and, insofar as we are aware, any other jurisdiction. The question raises issues relating to the court's personal jurisdiction over the appellant, jurisdiction over the subject matter, and jurisdiction to enter an order affecting a nonparty.⁴ First, we consider appellant's contention that the filing of her counterclaim did not give the lower court personal jurisdiction over her.

Superior Court Domestic Relations Rule 13(a) provides that a defendant brought suit upon by process by which this court did not acquire jurisdiction to render a personal judgment need not file a compulsory counterclaim.⁵ As a nonresident defendant to a divorce pro-

⁴ Specifically, appellant argues that the court was without jurisdiction to require her to submit her minor child to blood grouping tests because:

- (a) The infant is not a party and has not been served with process in the lawsuit and is not represented by counsel or a *Guardian ad litem*; and
- (b) The infant is not a resident of nor physically present in the District of Columbia but is a resident of West Berlin, the Federal Republic of Germany; and
- (c) The legitimacy *vel non* of the infant is not in issue in the lawsuit; and
- (d) No relief in the nature of maintenance, support or custody is sought on behalf of or against the infant. [Brief and Appendix for Appellant at 1.]

⁵ See *Advisory Committee's Note of 1963 to Subdivision (a) of Rule 13*. 3 J. MOORE, FEDERAL PRACTICE ¶ 13.01, at 29 (2d ed. 1972).

ceeding, Mrs. Beckwith, upon substitute service, was not subject to *in personam* jurisdiction. She could have answered and defended on the merits after her motions referred to in the Appendix were overruled without waiving her objections to the court's jurisdiction.⁶ However, she chose to counterclaim for divorce, which as not compulsory, was voluntary, and gave rise to personal jurisdiction. It is well settled that availing oneself of the jurisdiction of a court by filing a voluntary claim subjects the claimant to personal jurisdiction.⁷ We now turn to the question of subject matter jurisdiction and jurisdiction to enter an order affecting a nonparty.

Where there is subject matter jurisdiction, a court having personal jurisdiction may by its order affect persons other than those personally before it, *Alves v. Alves*, D.C.App., 262 A.2d 111 (1970), and may order an act which has an effect in another state or is to be carried out in another state. *New York v. O'Neill*, 359 U.S. 1 (1959); *Argent v. Argent*, 130 U.S.App.D.C. 46, 396 F.2d 695 (1968); H. GOODRICH & E. SCOLES, CONFLICTS OF LAWS, §§ 77-78 (4th ed. 1964). In the *Alves* case, the parents were personally before the court. This court held that the lower court had jurisdiction to enter an order that would determine the child's custodian, although the child was not present or a party. In deciding that a matter affecting the child could be decided without his presence, this court rejected "hard and fast rules of jurisdiction" in cases involving the internal affairs of the family unit. Similarly, we do so in the instant case and hold that the lower court had jurisdiction to issue the order challenged in this appeal.

⁶ *Morfessis v. Marvins Credit, Inc.*, D.C.Mun.App., 77 A.2d 178 (1950); Super. Ct. Dom. Rel. R. 12(b). But cf. *Davis v. Davis*, 305 U.S. 32 (1938).

⁷ *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938).

In this case the subject matter over which the court had jurisdiction is the question of the paternity of the child as proof on the issue of adultery. The basic pleadings in this case call into question the paternity of the child. Appellee-plaintiff in support of his complaint for divorce on grounds of adultery denies his paternity. He implies that blood grouping tests are or may be inconsistent with his paternity. Appellant-defendant, by her answer, contests the validity of his allegations and thus, by implication, denies that blood grouping tests could be inconsistent. Subject matter jurisdiction is jurisdiction over a matter in controversy. As blood tests are relevant to a determination of the issue of adultery in this case, and the possible results are in dispute by the parties, blood groupings are in controversy^{*} and thus part of the subject matter of this case.

In failing to recognize that the matter in controversy was the question of the paternity of the child as proof on the issue of adultery, as distinguished from the question of the legitimacy of the child for all purposes, appellant misconstrues the real jurisdictional basis of the order of the lower court. The order is not directed to the child. It is directed to a party who personally appeared before the court, and it requires her to perform an act within her power to perform as a lawful custodian of the child. The order requires no more of her than an order requiring her to give up custody of the child or to feed and clothe the child within the limits of a maintenance order, and in both such cases orders for blood tests have been upheld even though the child was not an actual party. *Beach v. Beach*, 72 App.D.C. 318, 114 F.2d 479 (1940); *State v. Cornett*, 391 P.2d 277 (Okla. 1964).

^{*} *Beach v. Beach*, 72 App.D.C. 318, 320-21, 114 F.2d 479, 481-82 (1940).

In *Beach, supra*, a divorce proceeding on the grounds of adultery in which maintenance for the child was requested, the court ordered blood grouping tests of the husband, wife and child to aid in determining paternity. It did so pursuant to Rule 35 of the Federal Rules of Civil Procedure, which at that time permitted the court to order a physical examination only of a party.[†] The court solved the problem presented by the absence of the child by concluding that the child was "in substance" a party for purposes of the case because "[s]ocially, [the child] is a most important party." *Id.* at 321, 114 F.2d at 482. However, the child was not made an actual party.

In *State v. Cornett, supra*, the husband brought an action for absolute divorce on the grounds of adultery alleging that he was not the father of the child born during the marriage. The wife counterclaimed for divorce, alimony, custody of the child and child support money. She contended that the trial court was without power to order a blood test for the child because no guardian ad litem had been appointed and the child had not been made a formal party plaintiff or defendant in the suit. In holding that the court had jurisdiction to order the wife to submit her child to a blood test the court held that:

[A] child whose paternity is questioned in a divorce action is not a necessary party to the action, and that the joinder of such child as a party is not a pre-requisite to the ordering of blood tests for the child. [*Id.* at 282.]

The appellant would distinguish the *Beach* and *Cornett* cases on the basis that they involved maintenance or custody, whereas the instant case does not. Apparently

[†] The rule was amended in 1970 so as to provide, among other things, that the court may order a physical examination of one who is under the legal control of a party.

it is appellant's view that maintenance and custody cases directly affect the welfare of the child, whereas in an adultery case the welfare of the child is not affected directly, and that it is only in the former situation that the court has subject matter jurisdiction to issue an order affecting a nonparty. For jurisdictional purposes this is a distinction without a difference. In both situations the court had *in personam* jurisdiction over the mother; and in both situations the matter in controversy affects the affairs of the family as a unit. Since we reject "hard and fast rules of jurisdiction" in matters affecting the family unit, as did the court in the *Alves* case, *supra*, the degree to which the family unit is affected does not control the question of jurisdiction. Whether or not jurisdiction should be exercised in either case is a separate question.

While in certain circumstances courts have declined to order acts by those personally before the court that affect others not present and in other states or countries, this reluctance is a reluctance to exercise jurisdiction, not lack of jurisdiction.¹⁰ It may be overcome by exigencies such as the exigencies of domestic life, as here.¹¹ Furthermore, as recognized by the lower court, and as stated in *State v. Cornett*, "the trial of a lawsuit is essentially a search for the truth and not a mere sporting proposition or game in which arbitrary and artificial rules should be applied in order to afford each side an equal chance of winning." 391 P.2d at 283.

D.C. Code 1973, § 16-2343, discussed in Part II, *infra*, recognizes the relevancy of blood tests in adultery actions by providing that in such cases the court may order

¹⁰ H. GOODRICH & E. SCOLES, *supra* § 78.

¹¹ See Judge Traynor's opinion in *Sampson v. Superior Court*, 32 Cal.2d 763, 197 P.2d 739 (1948).

blood tests of the mother, father, and minor children. If the exercise of jurisdiction to order blood tests of children were limited to those instances where the children are physically present or domiciled in the District of Columbia, or the subject of a support, maintenance or custody action, it would vitiate the statute's use in many adultery cases because the children often reside with one spouse in a jurisdiction different from that of the other spouse after the separation of the parents.¹² However, a relevant consideration in each case is due process; namely, are the child's interests, insofar as they are affected by an order, adequately protected by his mother. In the case before us the record shows that the child's interests are adequately protected.¹³ We hasten to add that the interests which are affected in this case relate only to the determination of adultery, as the child, for the reasons stated at the conclusion of this Part I, is not bound by the result of this proceeding in any subsequent case where his legitimacy is questioned.

Our conclusion that the court had jurisdiction and that there was no abuse of discretion in exercising same has been without reliance upon the primary basis stated by the lower court for its jurisdiction. The lower court based its determination of subject matter jurisdiction primarily on D.C. Code 1973, § 16-909, stating in its March 19, 1975 order that § 16-909 gave rise to a "mandatory duty of the court to establish legitimacy. . . ." We reach a contrary conclusion.

¹² This split-residence problem was the basic reason this court, in *Alves*, rejected "hard and fast rules" and exercised jurisdiction. 262 A.2d at 117.

¹³ The adequacy of the appellant's protection of the child's interest is shown in Part IV, *infra*, where we conclude that the failure of the court to appoint a guardian ad litem did not deny the child due process of law.

D.C. Code 1973, § 16-909, provides in full as follows:

A divorce for a cause provided for by this chapter does not affect the legitimacy of the issue of the marriage dissolved by the divorce, but the legitimacy of the issue, if questioned, shall be tried and determined according to the course of the common law. [Emphasis added.]

The predecessor statutes to § 16-909 do not appear to have been the subject of judicial interpretation in this jurisdiction. The legislative history is quite sparse, and the State of Maryland did not have a similar statute at any time prior to § 16-909's enactment.¹⁴

The first appearance of the present § 16-909 was in the 1857 proposed code for the District of Columbia that was not passed by the voters and therefore did not become positive law. It provided:

A divorce for other causes than those hereinbefore specially provided for, shall not affect the legitimacy of the issue of the marriage; but the legitimacy of such issue, if questioned, shall be tried and determined according to the course of the common law.¹⁵ [Emphasis added.]

In 1860, § 16-909 first appeared as positive law in the District of Columbia as follows:

And be it further enacted, That a divorce for causes not hereinbefore specially provided

¹⁴ "The common law, all British statutes in force in Maryland on February 27, 1801 . . . shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of the 1901 Code." D.C. Code 1973, § 49-301.

¹⁵ Revised Code of the District of Columbia, tit. X, ch. 69, § 12 (1857).

for, shall not affect the legitimacy of the issue of the marriage; but the legitimacy of such issue, if questioned, shall be tried and determined, according to the course of the common law.¹⁶ [Emphasis added.]

The 1860 provision remained unchanged as to substance during subsequent enactments and compilations¹⁷ until 1901. In 1901 it was changed to substantially its present form,¹⁸ with changes in phraseology in 1963.¹⁹

By comparison of the successive statutes it is apparent that all of § 16-909's predecessors provided that a divorce should not affect the actual status of the child as legitimate or not, except for those causes for divorce that were "hereinbefore specially provided for" in the prior to 1901 enactments. In those enactments such causes were bigamy and lunacy.²⁰ The pre-1901 statutes never provided that a divorce on grounds of adultery could affect the legitimacy of the child, even though evidence of illegitimacy was presented to prove the underlying cause of action for divorce. After the enactment of

¹⁶ Act of June 19, 1860, ch. 158, § 8, 12 Stat. 60.

¹⁷ Revised Statutes of the United States relating to the District of Columbia, ch. 22, § 744 (Washington 1875); The Compiled Statutes in force in the District of Columbia, ch. 30, § 40 (W. Abert & B. Lovejoy 1894).

¹⁸ Act of March 3, 1901, ch. 22, § 974, 31 Stat. 60.

¹⁹ Act of December 23, 1963, ch. 9, § 16-909, 77 Stat. 561.

²⁰ Revised Statutes of the United States relating to the District of Columbia, ch. 22, §§ 742-44 (Washington 1875); The Compiled Statutes in force in the District of Columbia, ch. 30, §§ 38-40 (W. Abert & B. Lovejoy 1894). In the non-enacted 1857 Revised Code such causes included certain causes in addition to bigamy and lunacy. Revised Code of the District of Columbia, tit. X, ch. 69, §§ 9-12 (1857).

1901, § 16-909 precluded all divorce actions from affecting the status of the child as legitimate or not.

The highest court in the Commonwealth of Massachusetts has interpreted a statute most similar to § 16-909, namely:

A divorce for adultery committed by the wife shall not affect the legitimacy of the issue of the marriage, but such legitimacy, if questioned, shall be tried and determined according to the course of the common law. [G.L.(Ter.Ed.) ch. 208, § 25.]

In *Sayles v. Sayles*, 323 Mass. 66, 80 N.E.2d 21 (1948), the husband sued for absolute divorce on the grounds of adultery. The lower court found that "in fact the child is the result of intercourse by the libellee and a man other than the libellant." In applying its statute, the court on appeal held that it relied upon the aforesaid finding "only to the extent that it is a finding of adultery. . . . [because] the issue is not illegitimacy but adultery, as to which the birth of a child is not an essential element. . . . The child will not be bound by the decision."²¹

Our analysis of § 16-909's derivation and the opinion in the *Sayles* case, leads us to conclude that § 16-909 merely removes the adjudication of the status of the child from the divorce proceedings when the subject matter of the divorce action would call into question legitimacy, and does not create a mandatory duty for, or grant discretionary authority to, the court to determine

²¹ *Sayles v. Sayles*, *supra* at 23. (There is no indication in the reported case that the child was made a party.)

legitimacy so as to provide a basis for subject matter jurisdiction.²²

Finally, we hold, as did the court in *Sayles*, and in accordance with the prevailing authority,²³ that the child will not be bound by a decision in the instant case that the appellee is not his father. Although couched in terms of legitimacy, such a decision must be carefully distinguished from a decision on the issue of legitimacy *vel non* for purposes other than proving adultery.

²² Our interpretation of § 16-909 is well summarized by Flaherty in his work on District of Columbia practice, as follows:

Where the issue as to the legitimacy of a child is raised in a divorce action, the finding of the court on that issue is not determinative of the question of the paternity of the husband in such divorce suit, even though he may have successfully disputed the legitimacy of the child insofar as concerns the immediate purposes of the divorce case as such, but the question of the legitimacy of the child must be determined, if at all, in an independent action for that purpose. [2 P. FLAHERTY, DISTRICT OF COLUMBIA PRACTICE WITH FORMS, § 1600 (1949).]

²³ The authorities are well summarized in Annot., 65 A.L.R. 2d 1381 (1959), as follows:

Even though the paternity of a child has been placed in issue and adjudicated in an action for a divorce or annulment, and it is therefore res judicata as between the husband and wife . . . the adjudication is not binding on the child in a subsequent action between him and one of the spouses if he was not made a party to the action for divorce or annulment. [*Id.* at 1396.]

And an adjudication of illegitimacy or non-paternity is not binding on the child when it claims a share of a decedent's estate as heir of the husband or an interest in a trust as the lawful child of the husband. [*Id.* at 1397. The one exception to this rule is by statute in Kentucky. *Id.* at 1399.]

II.

Jurisdiction having been found, the next question is whether the court had discretionary authority under a rule or statute to order the appellant to submit her child to blood grouping tests for the sole purpose of deciding the issue of adultery and, if so, was such discretion exercised without abuse in this case.

Two provisions in the Rules of the Superior Court, and one in the District of Columbia Code, provide for the issuance of an order requiring a mother to submit her child to blood tests, specifically, Super. Ct. Dom. Rel. R. 35; Super. Ct. Dom. Rel. R. 405(f); and D.C. Code 1973, § 16-2343. Rule 405(f) refers only to paternity cases initiated pursuant to D.C. Code 1973, § 11-1101(11) and requires "written motion." Superior Court Domestic Relations Rule 35 incorporates by reference Civil Rule 35 and requires "notice and motion." D.C. Code 1973, § 16-2343 refers to all cases initiated pursuant to D.C. Code 1973, § 11-1101, inclusive of divorce on the grounds of adultery, and is silent on the question of notice and motion.

We conclude that § 16-2343 is authority for the order of the lower court in this case. Section 16-2343 provides that when it is relevant to an action for divorce:

[T]he court may direct that the mother, child, and the respondent submit to one or more blood tests to determine whether or not the respondent can be excluded as being the father of the child, but the results of the test may be admitted as evidence only in cases where the respondent does not object to its admissibility.

Here, since blood tests are relevant to this action for divorce, § 16-2343 is applicable.²⁴

Although the lower court did not refer to § 16-2343 in its order on reconsideration of March 19, 1975, it did make findings therein as to the relevance of the evidence that may be adduced from the blood tests to the matter in controversy and the need for such evidence in determining the truth.²⁵ For these reasons we conclude that the trial court did not abuse its discretion.²⁶

It is unnecessary to our decision in this case to decide if notice and motion are required under § 16-2343 as the purpose of notice and motion, the opportunity for each side to present its position, has been served by the attention given by the trial court to appellant's motion for reconsideration.

As § 16-2343 provides authority in this case for the court's order we need not reach the question of whether Rule 35 provides a basis for the court's order, as urged

²⁴ Neither the lower court nor any of the parties referred to § 16-2343 in this proceeding. The statute was amended in 1971 so as to provide for the ordering of blood tests in divorce proceedings, the prior provision limiting blood tests to paternity cases. Appellant was permitted to submit a supplemental brief concerning the effect of § 16-2343 in this proceeding. Appellant's position that "mother" in the statute should be read to mean "father," and "respondent" to refer to "mother" in this proceeding, is without merit.

²⁵ Part I, *supra*.

²⁶ See generally *Minor v. District of Columbia*, D.C.App., 241 A.2d 196 (1968), construing the predecessor statute. The exercise of discretion will not be disturbed unless it has been abused. *In re Mattullath*, 38 App.D.C. 497 (1912). See also *Etty v. Middleton*, D.C.Mun.App., 62 A.2d 371 (1948).

by appellee, nor need we consider appellant's numerous objections to the application of Rule 35 to this case."²⁷

III.

We consider, and reject, appellant's contention that the ordering of blood grouping tests of a child in a divorce proceeding to prove adultery violates the child's constitutional right to privacy.

The Supreme Court in *Schmerber v. California*, 384 U.S. 757 (1966), the principal blood test case, set out the factors for our consideration. The defendant in *Schmerber* had been arrested at a hospital where he was undergoing treatment for injuries sustained in an automobile accident. Over his objections, at the direction of a police officer, a sample of defendant's blood was withdrawn and analyzed. The Supreme Court found that the taking of the defendant's blood, its being tested and its admission into evidence did not violate the defendant's right to the "security of one's privacy." *Id.* at 767. In reaching its conclusion the Court considered two questions that are of relevance to our inquiry: (1) was the intrusion carried out in a reasonable manner and (2) was the nature of the intrusion reasonable under the circumstances. *Id.* at 768.

First the instruction ordered by the lower court will be carried out in a reasonable manner. The tests are to be performed by a reputable medical laboratory following accepted medical procedures. Second, the nature of the

²⁷ The concurring opinion relies on legislative history for the view that D.C. Code 1973, § 16-2343 does not apply to divorce proceedings. Our application of the statute rests on its plain wording because "there is no need to refer to the legislative history where the statutory language is clear." *Ex Parte Collett*, 337 U.S. 55, 61 (1949).

intrusion ordered is reasonable under the circumstances. The probative value of blood tests in determining paternity is great.²⁸ The extent of the intrusion is minor. Blood tests are routine in our everyday life, encountered in applying for marriage licenses, going into the military and entering college.²⁹

Those courts that have considered similar constitutional challenges to the ordering of blood grouping tests in matters involving paternity have uniformly rejected them.³⁰ In both *State v. Cornett*³¹ and *Anthony v. Anthony*,³² blood tests to determine nonpaternity in divorce proceedings on grounds of adultery were held to be non-violative of the child's right to privacy. In *Cortese v. Cortese*³³ blood tests of a child in a paternity proceeding were held to not infringe upon the child's right to privacy.³⁴

Appellant submits that the order violates her son's right to privacy as articulated in *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250 (1891), and its progeny. Appellant's reliance on *Botsford* as establishing a constitutional right to privacy that restricts this court's authority to order physical examination is misplaced. The Supreme Court in *Camden and Suburban R. Co. v. Stetson*, 177 U.S. 172 (1900), stated specifically that there

²⁸ S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS, (4th ed. 1967).

²⁹ *Breithaupt v. Abram*, 352 U.S. 432 (1957).

³⁰ See generally Annot., 46 A.L.R.2d 1000 (1956).

³¹ 391 P.2d 277 (Okla. 1964).

³² 9 N.J.Super. 411, 74 A.2d 919 (1950).

³³ 10 N.J.Super. 152, 76 A.2d 717 (1950).

³⁴ *Cortese* was cited with approval in *Breithaupt v. Abram*, *supra* at 437.

was no intimation in *Botsford* that physical examination "would be a violation of the Federal Constitution. . . ." *Id.* at 174. The Court, in *Botsford*, merely held that absent statutory or similar authority, federal courts could not order a physical examination. *Botsford* does not apply to the instant case because, as noted in Part II, *supra*, statutory authority for the physical examination here ordered is found in D.C. Code 1973, § 16-2343.³⁵ Those cases cited by appellant as *Botsford's* progeny were not blood test cases and are not relevant to our inquiry.

IV.

The court below did not appoint a guardian ad litem either in its *sua sponte* order of March 10, 1975 or in its order on reconsideration of March 19, 1975. The appellant never specifically requested such an appointment, but alluded to the absence of a guardian ad litem in her motion for reconsideration. On appeal appellant urges that the absence of a guardian ad litem in this case denies the child due process of law.³⁶ In view of the procedural history of this case, we believe that the question should be decided at this time.

We note initially that the appointment of a guardian ad litem under Super. Ct. Dom. Rel. R. 17(c) and (e) is limited, respectively, to parties and to proceedings within the Family Division involving custody of a minor child. Rule 17 does not specifically provide for the ap-

³⁵ Also, were Rule 35 to be applied here, it would provide the basis for the order under *Botsford*. *Sibbach v. Wilson*, 312 U.S. 1 (1941); *Beach v. Beach*, *supra*.

³⁶ Appellant also contends that the child is denied due process for jurisdictional reasons. For the reasons stated in Part I, *supra*, we hold that there has not been a denial of due process on this ground.

pointment of a guardian ad litem in cases such as the instant case, and appellant does not contend that the failure to appoint a guardian ad litem constituted procedural irregularity. However, no one can gainsay the right of the court to appoint a guardian ad litem when necessary for the protection of an infant who is affected by an order of the court. Thus, the question is solely whether the failure of the lower court to exercise its discretion and appoint a guardian ad litem denied the child due process of law. We hold the child has not been denied due process as the interests of the child are being fully and ably protected by the appellant in this proceeding.

As shown in Part III, *supra*, the appellant contended that the order appealed from violated the child's constitutional right to privacy. We concluded that the child's right to privacy was not violated by holding that the intrusion by the taking of the blood would be carried out in a reasonable manner and that the nature of the intrusion was reasonable under the circumstances. Our research convinces us that the appellant fully and ably presented the argument and that the presence of a guardian ad litem would not have resulted in a different conclusion.

This appeal was brought by a mother who was properly concerned over the effect of the lower court's order on the issue of legitimacy in some other proceeding. In vigorously pressing the point that there was no issue of legitimacy in this case, she was exercising her "entirely natural desire to protect her infant son's inheritance."³⁷ Her efforts on behalf of her child lead to our conclusion in Part I, *supra*, that the child will not be bound by an

³⁷ Appellant's Memorandum of Points and Authorities in Support of Motion to Dismiss or Strike Amended Complaint for Declaratory Judgment at 6.

adjudication in this case on the issue of paternity. A guardian ad litem could have accomplished no more. Accordingly, we conclude that there is no indication in the record that the interests of the appellant conflict with those of her minor child and there is every reason to believe that their interests are identical; that the interests of the child are being fully and ably protected by the appellant; and that the failure to appoint a guardian ad litem in this case does not deny the child due process of law. *Groulx v. Groulx*, 103 A.2d 188 (N.H. 1954); *Anthony v. Anthony, supra*; *State v. Cornett, supra*. See also Annot., 65 A.L.R.2d at 1393.

V.

The final issue presented by appellant is whether or not the trial court's conditioning of the order for suit money and counsel fees upon the prior filing of blood test results with the court denies appellant due process of law. It is not necessary to determine this issue as the appellee, both at oral argument and in his opposition to appellant's motion to reconsider, has consented to the striking of the condition. Thus, the trial court on remand will strike the "prior to" condition of its March 10, 1975 order and will issue separate orders for (1) suit money and counsel fees and (2) blood grouping tests.

Accordingly, the proceeding is remanded for action consistent with this opinion.

So ordered.

APPENDIX

The parties to this action, Robert T.L. Beckwith, plaintiff-appellee, and Annemarie Hoffman Beckwith, defendant-appellant, were married in Hartfield, Middlesex County, Virginia, on November 6, 1967. A male child, Timothy, was born on October 14, 1968. Appellee-husband filed a verified complaint in the Superior Court on October 30, 1973, for a decree of absolute divorce on the grounds of adultery, stating that the male child born to appellant during their marriage was admitted by her not to be his son. Plaintiff-appellee filed an amended complaint for absolute divorce on November 2, 1973, seeking to add a declaratory judgment that he was not the father of Timothy Lincoln Beckwith. On November 26, 1973, plaintiff-appellee sought by motion to amend the complaint by adding Timothy Beckwith as a party defendant.

On January 9, 1974, defendant-appellant sought by motion to quash service of process and return of service of process. Defendant-appellant then moved to dismiss or strike the amended complaint for declaratory judgment on January 22, 1974. Judge Nunzio, on March 12, 1974, denied the motion to quash service of process and return of service of process, denied plaintiff's motion to amend complaint by adding Timothy Beckwith as a party and granted the motion to dismiss or strike the amended complaint for declaratory judgment that plaintiff is not father of Timothy Beckwith, dismissing the amended complaint. On March 20, 1974, defendant-appellant moved to dismiss the complaint for lack of subject matter jurisdiction, claiming defendant was not a bona fide resident of the District of Columbia. Judge Pryor, on July 31, 1974, denied the motion to dismiss. On August 29, 1974, defendant-appellant moved to enlarge time to respond to the complaint and a consent order was issued by Judge Beard on August 29, 1974, granting the motion.

An answer and counterclaim for divorce were filed by appellant on September 27, 1974, alleging cruelty, adultery, and desertion and requesting alimony and counsel fees.¹ Also, on September 27, 1974, the appellant filed a motion for suit money and counsel fees pendente lite pursuant to D.C. Code 1973, § 16-911. On November 20, 1974, the case was assigned to Judge Ryan for all purposes. On March 10, 1975, the court, after consideration of the opposition to the motion and argument by counsel, issued a written order granting appellant's motion for suit money and counsel fees, conditioned, *sua sponte*, as follows:

[P]rovided that prior to the payment of the aforesaid sums by the plaintiff [appellee] the Oscar B. Hunter Memorial Laboratory, 915 19th Street, N.W., Washington, D.C. obtains and files with the Court blood tests of the plaintiff Robert T.L. Beckwith, defendant Annemarie Hoffman Beckwith, and the male child born to the defendant in Williamsburg, Virginia, on the 14th day of October 1968, the Laboratory to arrange for the work to be done in West Germany, and counsel for the plaintiff and defendant to make the necessary arrangements for the tests with the Laboratory; all costs incident to the making and filing of the aforesaid tests to be paid by plaintiff.

The appellant on March 3, 1975, filed with the trial court a motion to reconsider portions of its "ruling on motion of defendant," which this court considers as a motion for reconsideration of the trial court's March 10,

¹ An amended counterclaim was filed on March 10, 1975, adding a "Counter defendant (co-respondent)."

1975 written order.² On March 19, 1975, the trial court in an "Opinion and Order" filed on April 2, 1975, addressed itself to the motion for reconsideration and set forth its reasons for denying it and reaffirming the court's order of March 10, 1975. It is from the denial of the motion for reconsideration that a Notice of Appeal was filed.³

KELLY, Associate Judge, concurring: While I do not doubt that the trial court had authority to order the appellant to submit herself and her child to blood grouping tests, I am not persuaded that D.C. Code 1973, § 16-2343 is the source of this authority. My reading of the legislative history of § 16-2343 leads me to believe that it applies only to proceedings to establish paternity, D.C. Code

² The motion to reconsider was filed on March 3, 1975, seven days before the actual written order of March 10 was filed. The motion for suit money and counsel fees was filed September 27, 1974, but apparently not heard until February 13, 1975. (A jacket entry on that date states that an order was to be presented.) A proposed order was mailed by appellee to appellant on February 19, 1975, but was not presented to the trial judge until March 10, 1975, due to, as stated by the trial judge, "deficiencies in the handling of this pleading by the clerks office. . ." While the motion for reconsideration was directed to the court's ruling of February 13, 1975, and was filed some seven days before the actual written order, it nonetheless encompassed all points referred to in the signed March 10, 1975 order. Thus, in the circumstances of this case the court construes the motion for reconsideration as being from the March 10, 1975 order.

³ The Notice of Appeal was filed on April 4, 1975, from the "order of this court entered on the 14th day of March, 1975." The reference to March 14, 1975, is obviously a typographical error, and has been so considered by the parties, in that the date of the order appealed from is March 19, 1975.

1973, § 11-1101(11), actions brought against a putative father to enforce support of his child. D.C. Code 1973, §§ 11-1101(3), (10) and actions seeking custody of minor children, D.C. Code 1973, § 11-1101(4).

As the majority states, the predecessor statute to D.C. Code 1973, § 16-2343 was limited specifically to the paternity cases, the pertinent language being: "When it is relevant to the prosecution or defense of an illegitimacy action . . ." In its present form, the section provides:

When it is relevant to an action over which the Division has jurisdiction under section 11-1101, the court may direct that the mother, child, and the respondent submit to one or more blood tests to determine whether or not the respondent can be excluded as being the father of the child, but the results of the test may be admitted as evidence only in cases where the respondent does not object to its admissibility. Where the parties cannot afford the cost of a blood test, the court may direct the Department of Public Health to perform such tests without fee. D.C. Code 1973, § 16-2343.

Concededly, the first clause of the section as amended appears to apply this provision to all actions under which the Division has jurisdiction pursuant to D.C. Code 1973, § 11-1101, including divorce, where paternity is relevant. In my judgment, however, this interpretation is not supported by its legislative history.

The provision was first introduced in the House as part of House Bill No. H.R. 16196, 91st Cong., 2d Sess. (1972). In that bill the provision appeared, in the identical language in which it ultimately was enacted, under the heading "Subchapter II.—Paternity Proceedings." The

committee report which accompanied H.R. 16196 explained that:

The provisions of this subchapter relate to the establishment of paternity and to provide for the support of children born out of wedlock. [H.R. REP. No. 907, 91st Cong., 2d Sess. at 58 (1972).]

The committee noted that one purpose of the subchapter was to separate jurisdiction over paternity proceedings from that of juvenile cases and to provide that paternity proceedings become civil rather than quasi-criminal as had been the case under then existing statutes. *Id.* at 58-9. Another stated purpose of the subchapter was to allow the Corporation Counsel to "bring an action on behalf of a wife or child . . . to enforce the support of the wife or child where it appears that a public burden has been incurred or may be incurred." *Id.* at 59. With respect to blood tests, the report stated:

When blood tests are relevant to an action filed under this subchapter, the court may direct the mother, child, and respondent to submit to one or more tests to determine whether the respondent can be excluded as being the father of the child. The results of any test may be admitted only where the respondent does not object. [*Id.* at 59; emphasis supplied.]

No mention is made in the report of any legislative intent to extend the application of the blood test provision beyond those proceedings specifically referred to in the report. Consequently, I do not believe we can infer that Congress intended to extend this provision to divorce proceedings. Accordingly, I would rest the trial court's authority to order the blood tests on Super. Ct. Dom. Rel. R. 35(a), which provides:

ORDER FOR EXAMINATION. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.¹

The notice and motion requirements of the rule, as the majority notes, have been served by the attention given to the motion for reconsideration.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11492

ANNEMARIE HOFFMANN BECKWITH, APPELLANT,

v.

ROBERT T. L. BECKWITH, APPELLEE.

Appeal from the Superior Court of the
District of Columbia

(Hon. Joseph M. F. Ryan, Jr., Trial Judge)

(Argued April 22, 1977)

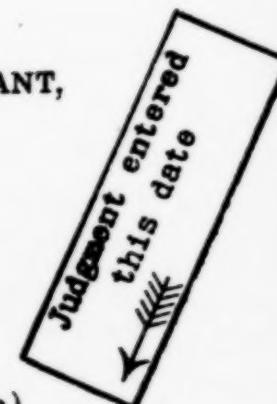
Decided October 31, 1977)

*Thomas Penfield Jackson, with whom Patricia D. Gurne was on the brief, for appellant.**Elizabeth R. Young for appellee.*

Before KELLY, NEBEKER and YEAGLEY, Associate Judges.

Opinion for the court by Associate Judge YEAGLEY.

Separate statement by Associate Judge KELLY concurring at p. 13.

YEAGLEY, Associate Judge: This is the second time the parties in this divorce action have been before this court. The first appeal, *Beckwith v. Beckwith*, D.C.App., 355 A.2d 537 (1976) (*Beckwith I*), chronicled the de-

¹ See *Beach v. Beach*, 72 App.D.C. 318, 114 F.2d 479 (1940).

tailed pleadings filed and established that for this divorce action the trial court had subject matter jurisdiction over the case, had personal jurisdiction over the parties, and could order the wife and her son to submit to blood grouping tests. We further mandated that Mrs. Beckwith's son would not be "bound by the result of this proceeding in any subsequent case where his legitimacy is questioned." *Id.* at 542. This second appeal is a consequence of the trial court's actions after remand from the first appeal.

Additional facts relevant to this second appeal must be noted. *Beckwith I* was decided on April 1, 1976, and on April 6 appellant (Mrs. Beckwith) filed a timely petition for rehearing or hearing en banc. D.C.App. R. 40. Under D.C.App. R. 41 the petition for rehearing stays the mandate of this court until disposition of the petition. We denied the petition on June 1, 1976. Under Rule 41, the court's mandate issued seven days later and was dated June 9, 1976.

While this court had before it the petition for rehearing, the trial judge, on April 13, 1976, pursuant to the remand instructions in our April 1 opinion (*id.* at 547), ordered Mrs. Beckwith and her son to undergo blood grouping tests and also ordered her husband to pay counsel fees and suit money (wife's maintenance and transportation expenses). The April 13 order required that the tests be completed within 30 days and that payment be made within 10 days. Nothing further happened in the trial court until after this court's mandate issued on June 9.

On June 10, appellee paid appellant's attorney the ordered attorney's fees (\$3,000) and suit money (\$1,000). Appellant's attorney kept the \$3,000 but returned the

suit money to appellee's attorney stating that he (wife's attorney) had been "unable to make any definite arrangements . . . to schedule further proceedings [in this case]."

On June 17, appellee filed a motion to set a definite trial date and to impose sanctions on Mrs. Beckwith for failing to submit to the blood grouping tests. On June 20, appellant's attorney filed a "motion to extend time to respond to motion to set definite trial date and to impose sanctions." In this motion, he stated that he had "never seen or spoken personally" with Mrs. Beckwith but that he had attempted "by cable, telephone, and correspondence" to communicate with her. He stated further that, with the aid of "correspondent counsel" in Memphis, Tennessee, he expected to meet with Mrs. Beckwith within the next two weeks. Appellee opposed the motion.

The trial judge denied appellant's motion and, on July 2, set trial for July 12, 1976.¹ A subsequent continuance motion, to delay trial for three months, also was denied.

On July 12, all necessary parties were in the trial courtroom except Mrs. Beckwith, and the judge postponed trial for one week. On July 13, the trial judge issued two orders that Mrs. Beckwith show cause: (1) why she should not be held in contempt for failing to submit to the ordered blood grouping tests, and (2) why her counterclaim should not be stricken for her failure to appear at trial on July 12.

Trial was held on July 19 and several significant things occurred or were established: (1) Mrs. Beck-

¹ The court's order stated that "it appear[ed] to the Court that there have been inordinate delays for questionable reasons in this three year old case and that there is no credible proof of any reason why the Court should extend [wife's] time."

with was not present, but her attorney presented Mrs. Beckwith's affidavit wherein she stated that her non-appearance was out of concern for her son's safety and out of concern that her son's legitimacy not be at issue in this divorce action between her and her husband; (2) Mr. Beckwith presented his case and (a) introduced an affidavit in the form of a separation agreement executed by him and his wife which acknowledged that "without the knowledge or consent of [her husband, she] became pregnant by a man unknown to [her husband],"² and (b) established by medical testimony that he had had a vasectomy in 1962 in connection with prostate surgery and was still sterile as of August 1968;³ and (3) it was established that Mrs. Beckwith's son was born in October 1968.

The formal orders disposing of the merits of this case stated that Mrs. Beckwith's counterclaim for divorce on cruelty, adultery, or desertion grounds had been stricken because of her failure to appear at trial and granted Mr. Beckwith's divorce request on the ground of adultery. With respect to the blood grouping tests, the trial judge stated that it is

FURTHER ORDERED with respect to the refusal of the defendant to submit herself and her child to blood-grouping tests, the sanction of contempt having been an attempt to obtain necessary and material testimony before the Court,

² Appellant asserts in her answer and on appeal that her signature on this affidavit was obtained by fraud and duress. No evidence of such was presented at trial.

³ Mr. Beckwith was allowed to reopen his case on August 4 for the sole purpose of taking testimony from one physician who had performed the vasectomy and to permit his cross-examination by wife's counsel.

and with the case having now been decided, such adjudication becomes moot and the Rule to Show Cause is discharged.

I.

Appellant's first three issues on appeal relate to procedural aspects of this case. She first contends that the trial court was without jurisdiction on April 13 to order the blood grouping tests and consequently was without jurisdiction to adjudge her in contempt. While appellant's argument may be a valid statement of the law, the entire contempt issue is not properly before us.

Appellant can only appeal from an adverse final order and judgment of the Superior Court. D.C. Code 1973, § 11-721. In the instant case there is no such final order or judgment respecting the blood grouping tests because the trial judge declared the issue moot and discharged his Order to Show Cause. Mrs. Beckwith was never "punished" for not submitting to the tests and, absent the imposition of a sanction, the contempt citation alone is not a final order and raises no justiciable issue for appeal. *In re Cys*, D.C.App., 362 A.2d 726, 728-29 (1976); *West v. United States*, D.C.App., 346 A.2d 504, 505 (1975).

Appellant's second procedural issue concerns the trial court's denial of her motion for a three-month continuance. The denial of a continuance rests in the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of an abuse of discretion. *Ungar v. Sarafete*, 376 U.S. 575, 589 (1964); *Feaster v. Feaster*, D.C.App., 359 A.2d 272, 273 (1976). No such showing was made by appellant nor could it be on the record in this case. The trial judge specifically ruled in an order denying appellant's earlier extension of time motion

"that there have been inordinate delays for questionable reasons on this three year old case and that there is no credible proof of any reason why the Court should extend [appellant's] time." This is not a case where a trial judge merely acquiesced in a prior ruling by another judge or a case where a party's presence was precluded by uncontested illness. See *Feaster v. Feaster*, *supra*. Nor was appellant, as she alleges, denied the opportunity to undertake discovery in this case. Appellee's responses to appellant's interrogatories were received, and it was appellant who cancelled deposition sessions with appellee. We cannot say that it was an abuse of discretion to deny the three-month continuance request.

The final procedural issue concerns the propriety of the trial court's dismissal of appellant's amended counterclaim. A trial court may, in its discretion, dismiss a claim which has not been prosecuted with reasonable diligence. Super. Ct. Civ. R. 41(b) and (c);⁵ *Link v.*

⁴ Rule 41: Dismissal of Actions:

....

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule

Wabash Railroad Co., 370 U.S. 626 (1962);⁵ *Wells v. Wynn*, D.C.App., 311 A.2d 829 (1973); *Garces v. Bradley*, D.C.App., 299 A.2d 142 (1973). This court will interfere with the exercise of that discretion only in extreme cases. *Link v. Wabash Railroad Co.*, *supra* at 633; *Bailey v. Washington Motor Truck Transportation Employees Pension Trust*, D.C.App., 240 A.2d 133, 134 (1968).

In the opinion and order filed by the trial court on October 1, 1976, Judge Ryan described the dilatoriness which led him to conclude that dismissal of appellant's counterclaim was appropriate.

.... In January, 1974, an appearance was entered by counsel retained to represent the wife. A Motion for a continuance to allow counsel to prepare for trial and consult with the client was requested. Defense counsel also filed a motion to

52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM OR THIRD-PARTY CLAIM. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

⁵ Super. Ct. Civ. R. 41 is virtually identical to Rule 41 of the Federal Rules of Civil Procedure. It should, therefore, be construed in light of cases such as *Link* which have involved the federal counterpart. *Campbell v. United States*, D.C.App., 295 A.2d 498, 501 (1972).

quash service and to oppose the motion to add the son as a party-defendant and to further dismiss or strike the amended complaint. The initial hearing on the motions was again postponed by counsel for the wife to March, 1974. The motion to quash was overruled, but the motion to strike the amended complaint was granted. In March 1974 defendant served interrogatories upon plaintiff and also filed a motion to dismiss for lack of subject matter jurisdiction. Although the interrogatories were answered by plaintiff, on April 7, 1974, defendant asked for a continuance for the purpose of taking depositions. Another continuance in May of 1974 re-set the motions to June. In June another continuance was granted to consolidate motions and to arrange the order in which they should be heard.

Although defendant's motion to compel discovery was withdrawn, Judge Pryor on July 31, 1974, overruled the motion to dismiss which had been set for hearing and also held as moot a motion for a protective order. On August 5, 1974, to allow the defendant to fully respond to the complaint, plaintiff consented to a continuance until September 1, 1974. It is interesting to note that in this motion counsel for defendant specifically stated that he had not contacted his client and needed further instructions from her.

On August 29, 1974 for the same reason a further enlargement of time was granted to respond until October 1, 1974. An Answer and counter-claim was finally filed September 27,

1974—eleven months after suit had been instituted. A motion for suit money and counsel fees *pendente lite* accompanied the Answer. An opposition to this was filed together with a motion to dismiss the counter-claim.

Another continuance was sought and granted on November 5, 1974 followed by a continuance on January 7, 1975 until February 13, 1975. On March 10, 1975 the court heard the motions for suit money and counsel fees and granted them conditioned upon the defendant and child undergoing a blood test to determine paternity. On the same day the court granted the motion to dismiss the counter-claim but allowed defendant ten days in which to amend. Defendant had also filed a request for production of documents to which there was opposition and defendant opposed the order of the court as to the blood-grouping tests. The documents were produced within two weeks, but the dispute arising out of the order for blood-grouping tests resulted in a further order dated March 19, 1975.

Defendant noted an appeal on March 14, 1975 and on November 13, 1975 the Court of Appeals heard argument. The decision in the case was rendered April 1, 1976. The Order on Remand gave defendant thirty days in which to comply with the blood-grouping test order. On June 17, 1976 plaintiff filed a motion to impose sanctions and also to set a trial date certain. Counsel for defendant replied requesting additional time to answer the motion and also to consult with the defendant. Counsel admitted he had never seen or talked with defendant

during the two and one-half years of representing her even though several [continuances had] been sought and granted for that very purpose. On July 2, 1976 the court ordered that trial be set ten days from that date but refrained from imposing sanctions.

On July 12th the plaintiff and his attorney appeared as well as the attorneys for the defendant. Not only was defense counsel unprepared for trial but it also appeared that a reply to the amended counter-claim of March 10, 1975 had not yet been filed. A Motion for leave to file such pleading had been filed on July 8, 1976 as well as the actual reply itself. The Reply to the amended counter-claim which was a *pro forma* reply was accepted as filed and a continuance of one week was granted. Defendant then sought to argue motions for continuance and to dismiss which counsel claimed had been filed but which were not reflected in the court jacket. The court ruled orally that both motions would be overruled.

It appeared that typed motions of that identical nature were filed the next day, July 13, 1976, the day following the oral order of the trial court overruling them. The record reveals also that on July 13, 1976 defendant had noticed plaintiff for deposition. The Orders to Show Cause were signed on July 13, 1976 in an attempt to secure defendant's presence or her compliance with the earlier Order on Remand. These Orders included the sanctions of striking defendant's counter-claim for her failure to prosecute as well as adjudicating her in contempt for refusal to comply with the Order on Remand.

A trial was finally commenced on July 19, 1976 after the court overruled oral motions of defendant to disqualify the court on the basis of bias and prejudice. An affidavit from the State of Florida apparently signed by defendant, but not certified by counsel was held by the court to be legally insufficient. . . .

Under these circumstances, dismissal of appellant's counterclaim was not an abuse of discretion.*

II.

Appellant's final contention on appeal is that the trial judge erred in awarding Mr. Beckwith a divorce on the ground of adultery. The evidence on the adultery issue presented at trial established the birth of Mrs. Beckwith's son in October 1968 and that Mr. Beckwith was sterile in August 1968, as a consequence of 1962 prostate surgery. A physician testified that, "Mr. Beckwith was completely sterile from the time of his operation in '62 to '68 when he came back to me" In addition, Mrs. Beckwith's affidavit averring that Mr. Beckwith was not the father of her son was admitted as evidence and included the statement that Mrs. Beckwith's pregnancy by a man unknown to her husband was without her husband's consent. Appellant did not offer any evidence to disprove adultery and now asserts that because the possible explanations of artificial insemination (without her husband's consent) or rape to

* A number of other courts have found dismissal appropriate under similar circumstances. E.g., *Wojton v. Marks*, 344 F.2d 222 (7th Cir. 1965); *Esteva v. House of Seagram, Inc.*, 314 F.2d 827 (7th Cir. 1963); *Deep South Oil Co. of Texas v. Metropolitan Life Ins. Co.*, 310 F.2d 933 (2d Cir. 1962).

account for her son's birth were not disproved by her husband at trial, the charge of adultery was not proved by the required clear and convincing evidence. In its opinion and order the trial court said: "The court finds by clear and convincing evidence that the plaintiff was not and could not have been the father of the child."

Adultery is voluntary sexual intercourse by a married person with someone other than his or her spouse. 27A C.J.S., *Divorce* § 21 (1968); 24 Am.Jur.2d, *Divorce and Separation* § 25 (1966); Nelson, *Divorce and Annulment*, Vol. 1, § 5.04, at 168 (2d ed. 1945); *Flood v. Flood*, 211 Md.App. 395, 330 A.2d 715 (1975); *Brodsky v. Brodsky*, 153 Conn. 299, 216 A.2d 180 (1966). In this jurisdiction it is well settled that adultery must be proved by clear and convincing evidence. Mere circumstances of suspicion are insufficient to sustain the charge. *Snyder v. Snyder*, D.C.App., 222 A.2d 850, 851 (1966); *Stephenson v. Stephenson*, D.C.App., 221 A.2d 917, 918 (1966); *Hagans v. Hagans*, D.C.App., 215 A.2d 842, 844 (1966); *Line v. Line*, D.C.Mun.App., 177 A.2d 271, 272 (1962). There is no doubt, however, that circumstantial evidence can be used to prove adultery, *Stephenson, supra*, and that no eyewitness proof is required. *Stewart v. Stewart*, 52 U.S.App.D.C. 323, 286 F. 987 (1923). "The degree of requisite corroborative proof varies from case to case and cannot be expressed in a rule of general application." *Coven v. Coven*, 64 N.J. Super. 6, 165 A.2d 200, 201 (App. Div. 1960).

In this case, the evidence that Mr. Beckwith was incapable of procreation in 1968 and Mrs. Beckwith's admission that her son had been fathered by someone other than her husband are more than sufficient to support the trial court's finding of adultery. It was not

necessary for appellee to disprove every alternative explanation of the child's conception.

The judgment of the trial court is

Affirmed.

KELLY, Associate Judge, concurring: As I understand the record, appellant's counterclaim was stricken because she deliberately refused to appear and show cause why she should not be held in contempt of court. Although the word "dismissal" was occasionally used in the colloquy between court and counsel,¹ appellant could not thereafter prosecute a counterclaim which had been stricken. Since I believe the court's action in striking the counterclaim was an appropriate sanction to impose, however, I concur in the finding of no abuse of discretion and join in the remainder of the court's opinion.

¹ A claim or counterclaim may also be dismissed for failure to "comply with . . . any order of the court. Super. Ct. Civ. R. 41(b) and (c).